CHUAH SEOW KENG & ANOR

v.

RHINA BHAR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-458 OF 1995]
23 JANUARY 1997

CONTRACT: *Specific performance - Sale and purchase agreement - Whether respondent entitled to specific performance - Whether there was a concluded contract - Whether terms and conditions had been agreed upon*

The appellants had entered into negotiations with the respondent wherefore they sought to sell some landed property to the latter. The parties having agreed to the terms and conditions of the sale, the appellants' solicitors then submitted an agreement in quadruplicate to the respondent's solicitors for execution. The respondent signed the agreement and accordingly paid a cheque for RM30,000 as deposit and part-payment thereof. The appellants, however, refused to proceed with the sale and thereafter sought to return the cheque to the respondent. No reason was given by the appellants then for backing out of the agreement. It was only after the respondent filed a claim for specific performance that the appellants pleaded in their statement of defence that they had decided to abort the agreement because (i) they never agreed to sell the property with vacant possession (ii) the option to sell the property was only signed by the first appellant.

The respondent filed a summons in chambers for specific performance whereupon specific performance was granted by the High Court. The appellants appealed and argued *inter alia* that the order for specific performance was improper as the respondent had not paid the balance 90% of the purchase price within the four months period stipulated in the agreement. The issue that arose was whether, on the facts, a contract had been concluded between the appellants and the respondent, and if so, whether the respondent is entitled to specific performance.

Held:
Per Shaik Daud Ismail JCA

[1] The learned Judge was right in holding that a contract had existed between the appellants and the respondent. There is no reason why the appellants through their solicitors would send four copies of the

agreement to the respondent's solicitors for execution, if all the terms and conditions of the sale had not been agreed.

[2] The appellants have made an offer to sell the property to the respondent who accepted it, signed the sale and purchase agreement in quadriplicate and thereafter tendered the requisite 10% by cheque to the appellants' solicitors who in turn cashed it and kept the money as stake holder. In the circumstances, there was nothing more that the respondent need do. She has fulfilled her part of the agreement and it is left to the appellants to do their part. This the appellants failed to do and they had therefore breached the agreement. It follows that the respondent is entitled to specific performance.

[3] The issue raised by the appellants that the option was invalid because the second appellant had not given the option is a new issue and cannot therefore be raised at this stage. The matter had reached a stage well beyond the option stage, i.e. all terms of the sale and purchase had been agreed by both parties, and what needed to be done is only for the appellants to execute the sale and purchase agreement.

[3a] The issue of vacant possession had not been raised by the appellants either at the negotiation stages or at the time when the parties finally agreed on the terms when the respondent executed the four copies of the agreement. Thus, up to that stage there was no evidence at all that the appellants did not agree to sell the property to the respondent. Vacant possession, hence, cannot be raised as an issue.

[4] There is no merit in the argument that the respondent is not entitled to specific performance because he has not paid the balance of the purchase price. The respondent cannot pay the balance price and perform the contract because the appellants had refused to sign it and also because there was a stay order after judgment had been obtained by the respondent. The stipulated time of four months for completion of the contract need only be followed if the appellants had signed the contract.

[Appeal dismissed. Appellants ordered to sign sale and purchase agreement.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Pelaksanaan spesifik - Perjanjian jual beli - Samada responden berhak kepada pelaksanaan spesifik - Samada kontrak wujud - Samada syarat dan terma dipersetujui*

Perayu-perayu telah membuat beberapa perundingan dengan responden di mana mereka berhasrat untuk menjual suatu hartanah kepada pihak yang kemudian.

Setelah kedua-dua pihak bersetuju dengan terma dan syarat penjualan, satu perjanjian dalam empat salinan telah dihantar oleh Peguamcara perayu kepada Peguamcara responden untuk dimeterai. Responden telah menandatangani perjanjian tersebut dan seterusnya membuat bayaran pendahuluan dan deposit sebanyak RM30,000 melalui cek. Perayu, bagaimanapun, enggan untuk meneruskan penjualan dan kemudiannya cuba untuk memulang balik cek di atas kepada responden. Tiada sebab diberikan oleh perayu pada waktu itu kenapa mereka enggan memeterai perjanjian tersebut. Hanyalah selepas responden memfailkan tuntutan untuk pelaksanaan spesifik perayu menyatakan dalam pernyataan pembelaan mereka bahawa mereka bertindak demikian kerana (i) mereka tidak pernah bersetuju untuk menjual hartanah tersebut dengan pemilikan kosong (ii) opsyen untuk menjual hartanah tersebut hanya ditandatangani oleh perayu pertama.

Responden telah memfail saman dalam kamar menuntut pelaksanaan spesifik, dan berikutan itu pelaksanaan spesifik telah dibenarkan oleh Mahkamah Tinggi. Perayu merayu dan berhujah antara lain bahawa perintah pelaksanaan spesifik adalah tidak wajar oleh kerana responden gagal membayar baki harga belian yang 90% lagi dalam masa empat bulan sepertimana yang diperuntukkan oleh perjanjian. Isu yang timbul ialah samada, berdasarkan fakta, suatu kontrak telah pun termeterai di antara perayu dan responden, dan jika begitu, samada responden berhak kepada pelaksanaan spesifik.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim yang bijaksana adalah betul dalam memutuskan bahawa suatu kontrak telah pun wujud di antara perayu dan responden. Tiada sebab kenapa perayu melalui Peguamcara mereka akan menghantar empat salinan perjanjian kepada Peguamcara responden untuk dimeterai, sekiranya kesemua terma dan syarat penjualan tidak dipersetujui.

[2] Perayu telah membuat tawaran untuk menjual hartanah tersebut kepada responden yang telah menerimanya, menandatangani perjanjian jual beli dalam empat salinan dan selepas itu membuat bayaran 10% seperti yang dikehendakki melalui cek kepada Peguamcara perayu yang menunaikannya dan menyimpan wang tersebut sebagai stakeholder. Dalam halkeadaan ini, tiada apa lagi yang perlu dilakukan oleh responden. Beliau telah pun melaksanakan bahagiannya dalam perjanjian tersebut dan ianya bergantung kepada perayu untuk memenuhi bahagian mereka. Ini gagal dilakukan oleh perayu dan mereka oleh sebab itu telah memungkiri perjanjian tersebut. Ianya mengikut bahawa responden adalah berhak kepada pelaksanaan spesifik.

[3] Isu yang dibangkitkan oleh perayu bahawa opsyen berkenaan adalah tak sah sebab perayu kedua tidak menandatanganinya adalah isu baru dan dengan itu tidak boleh dibangkitkan diperingkat ini. Perkara ini telah pun melepasi peringkat opsyen, yakni, kesemua terma dan syarat perjanjian telah pun dipersetujui oleh kedua-dua pihak, dan apa yang perlu dilakukan hanyalah bagi perayu memeterai perjanjian tersebut.

[3a] Isu pemilikan kosong tidak dibangkitkan oleh perayu samada diperingkat perundingan atau pun sewaktu mereka mempersetujui tentang terma-terma bilamana responden memeterai empat salinan perjanjian tersebut. Jelaslah bahawa, hingga diperingkat inipun tiada bukti yang menunjukkan bahawa perayu tidak bersetuju untuk menjual hartanah tersebut kepada responden. Milikan kosong, dengan itu, tidak boleh dibangkitkan sebagai suatu isu.

[4] Tidak ada merit dalam hujah bahawa responden tidak berhak kepada pelaksanaan spesifik kerana beliau tidak membayar baki harga belian. Responden tidak dapat membayar harga belian dan tidak dapat melaksanakan perjanjian sebab perayu enggan menandatanganinya dan juga sebab terdapatnya satu perintah penggantungan selepas penghakiman diperolehi oleh responden. Masa empat bulan untuk menyempurnakan kontrak hanya perlu dipatuhi jika perayu menandatangani kontrak.

[Rayuan ditolak. Perayu diperintahkan menandatangani perjanjian jual beli.]

Case referred to:
Filby v. Hounsell [1896] 2 Ch. 737 ***(refd)***

[Appeal from High Court Malaya, Pulau Pinang; Civil Suit No: 22-114-1994]

For the appellants - M/s Shearn Delamore & Co
For the respondent - M/s Tan, Yu & Co

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is from the decision of the Penang High Court which had on 22 June 1995 granted specific performance to the respondent of a sale and purchase agreement of a piece of land. The 1st and 2nd appellants are and were at all material times proprietors of a property known as Lot 87 Section 19, Daerah Timur Laut, Penang with a premises errected thereon known as No. 11 Love Lane, Penang. The respondent entered into negotiations to purchase the said property from the appellants. After a series of correspondences between their solicitors, and the solicitors for the appellants on the terms to be included in the sale and purchase agreement, the solicitors

for the appellants (the vendor) submitted a final draft of the agreed sale and purchase agreement in quadruplicate to the solicitors for the respondent, ('the purchaser'). *Inter alia* the agreement provides that the purchaser shall pay 10% of the agreed purchase price on signing of the agreement. The purchase price was agreed at RM300,000. The balance of RM270,000 is to be paid within four (4) months from the date of the agreement with further extention of two (2) months subject to an interest at the rate of 10% per annum.

Pursuant to this on 15 December 1993 the respondent through her solicitors sent a cheque for RM30,000 being the deposit and part payment of the purchase price, together with the sale and purchase agreement (in quadruplicate) duly signed by the respondent. After that nothing was heard from either the appellants or their solicitors inspite of two reminder letters sent to the appellants' solicitors. Then by a letter dated 28 January 1994, solicitors for the appellants using their own cheque returned the RM30,000 directly to the respondent without affording any reason. Pursuant to this, solicitors for the respondent sent a letter dated 3 February 1994 to solicitors for the appellants returning the cheque for RM30,000.

The respondent then filed a writ and statement of claim against the appellants on 25 April 1994, for specific performance, damages and consequential reliefs.

It was only after filing the defence did the appellants openly make known the reasons why he did not wish to proceed with the sale. In their statement of defence, *inter alia*, the appellants states that they never agreed to sell the property with vacant possession, and secondly that the option to sell the property was signed only by the 1st appellants. Pursuant to this the respondent filed a Summons in Chambers dated 25 October 1994 for specific performance. The High Court came to a finding that a contract existed between the parties and granted specific performance to the respondent.

The issue in this appeal is whether, in the circumstances of this case, a contract had come into being between the appellants and the respondent and if so whether respondent is entitled to specific performance.

What seems clear is that before the final draft agreement was drawn up, parties must have entered into negotiations on the terms and conditions of the sale. This is clearly evident in this case, in the various correspondences tendered by both parties which finally ended in a final draft containing all the agreed terms and conditions of the sale. The final agreement was submittedby the appellants themselves through their solicitors and this was sent to the solicitors for the respondent in quadruplicate for execution by the respondent. In our view, if all the terms and conditions of the sale had not been agreed, why would the appellants through their solicitors send four copies of the agreement

to the respondent's solicitors for execution. The four copies of the sale and purchase agreement, *inter alia*, provides that:

(a) the purchase price is RM300,000;

(b) deposit to be paid on signing of the sale and purchase agreement is RM30,000;

(c) the balance of the purchase price RM270,000 is to be paid in four months with an extension of two months subject to a payment of 10% interest;

(d) the purchaser is entitled to specific performance;

(e) the sale of the property is free from any encumbrances.

There is no denial that respondent had paid the 10% deposit to the appellants' solicitors *vide* cheque MBB No. 996092 on 15 December 1993 and had also signed the sale and purchase agreement in quadruplicate. When there was no response from the appellants' solicitors, respondent's solicitors wrote two letters dated 28 December 1993 and 28 January 1994 enquiring about the matter. Then *vide* letter dated 28 January 1994 appellants' solicitors sent a cheque of their own MBB No. 487422 for RM30,000 purporting to return the deposit paid by respondent and to repudiate the contract without assigning any reason whatsoever for the repudiation. Faced with these sets of facts, we are of the view that the learned Judge was right in holding that a contract existed between appellants and respondent. In *Filby v. Hounsell* [1896] 2 Ch. 737 the vendor's name was omitted from the conditions of sale by auction of a house and from the indorsed form of contract to be signed by a purchaser. The house was not sold at the public auction, but subsequently the defendant sent a letter addressed on the face of it to J & Co., who were the auctioneers, offering to purchase the house for £350, and stating that if his offer was agreed he would "sign contract on auction particulars". J & Co. replied by letter stating that on behalf of their client (who was the vendor), naming her, they accepted the offer "subject to contract as agreed. We enclose draft contract". The draft was identical with the contract embodied in the conditions of sale and endorsement, except that the draft stated the vendor's name, but the defendant never signed it. It was held that as the offer contained the names of both contracting parties (though one was only the agent of an undisclosed vendor) on its acceptance there was a valid contract within the Statute of Fraud and that the acceptance was absolute and unconditional, in as much as a form of contract definitive in all its terms was identified by the offer and that signatures to the form of contract was unnecessary.

In the present case, the appellants through their solicitors made an offer to sell the said property to the respondent who accepted it, signed the sale and purchase agreement in quadruplicate, tendered the requisite 10% by cheque to the appellants' solicitors who in turn cashed it and kept the money as stakeholder. Now, what more need the respondent do? The respondent has fulfilled her part of the agreement and it is left to the appellants to do their part. This they failed to do, therefore, it seems clear to us that the appellants' had breached. The issues raised by the appellants are, to our mind, new issues. Firstly on the issue of the option not being valid as the 2nd appellants did not give the option, ought not to be raised at this stage. The matter had reached a stage well beyond the option stage ie, all terms of the sale and purchase had been agreed to by both parties. What needed to be done is only for the appellants to execute the sale and purchase agreement. Secondly the issue of vacant possession too does not arise as this issue had never been an issue. It was never raised by the appellants at the negotiations stages nor was it raised at the time when both parties finally agreed on the terms when the respondent executed the four copies of the agreement. Up to this stage there is no evidence at all that the appellants did not agree to sell the said property to the respondent.

At the appeal learned Counsel for the appellants argued that even if this Court holds that a binding contract had come into effect, the respondent is still not entitled to specific performance. He argues that the agreement was entered on 15 December 1993 and it allowed for the balance of the purchase price to be paid within four months from the date of agreement with an extension of two months with interest at 10% per annum. However, he contends that the minute of the judgment provides that the balance of the purchase price is to be paid four months from the date of the order with an extension of two months without interest. He further contends that even up to the date of the hearing the respondent has not paid the balance of the purchase price. Therefore, he claims, the respondent is not entitled to specific performance. We find no merit in this line of arguement. As to why respondent could not pay the balance of the purchase price up to the hearing of the appeal is quite obvious. On the appellants' application, the High Court had granted a stay of execution. As to the four months mentioned in the agreement, this too could not be carried out, since the appellants refused to sign the contract. What, therefore, is the date, for the respondent to pay the balance of the purchase price? Time began to run from the date of the contract but the respondent cannot perform or complete the contract firstly because appellants refused to sign it and secondly after respondent had obtained judgment, there was a stay order. If the contract had been signed by the appellants, then the stipulated time has to be followed as there exists a fixed time to complete the contract. Furthermore, by agreeing

that the contract was entered on 15 December 1993, the appellants should not blow hot and cold, by now saying that there was no contract between appellants and respondent.

We are of the same view as the learned Judge of the High Court that, in the circumstances of this case, a contract between appellants and respondent has indeed come into effect on 15 December 1993 and since the appellants had refused to sign the contract, they have breached the contract and therefore, the respondent is entitled to specific performance. We therefore dismissed the appeal with costs and made the following orders. Appellants to sign the sale and purchase agreement one month from the date of this order and all the times mentioned in the minute of judgment shall begin to run after the date of the signing by the appellants. The extension of two months shall be with interest at 10% per annum. We also ordered that the costs in the Court below be on a chamber hearing basis and the deposit is to go towards taxed costs.

Reported by WA Sharif